

The information in this brochure is a brief summary of Wisconsin's overtime regulations. You are urged to contact the division for more details as they apply to a specific situation.

OVERTIME COVERAGE

Wisconsin's overtime rules apply to most businesses in the state, including units of state and local government. They do not, however, necessarily apply to each individual worker. Covered workers must be paid time and one-half the regular rate of pay for all hours worked in excess of 40 hours per week.

The law applies specifically to factories, mercantile (see definition of "mercantile," below) or mechanical establishments, restaurants, hotels, motels, resorts, beauty parlors, retail and wholesale stores, laundries, express and transportation firms, telegraph offices and telephone exchanges.

"Mercantile," according to language in the Administrative Code (Chapter DWD 274, Wis. Admin. Code), means "pertaining to merchants or trade," and is synonymous with the word commercial. Commercial is viewed with regard to profit or designed for profit; designed for mass appeal, emphasizing skill and subjects useful in business. "Trade" means the business or work in which one engages regularly, an occupation requiring manual or mechanical skill; the persons engaged in an occupation, business, or industry, dealings between persons or groups; the business of buying and selling or bartering commodities or services; to do business with, to have dealings, to give one thing in exchange for another.

Under the Wisconsin Child Labor regulations, 16- and 17-year-old minors must also be paid time and one-half the regular rate of pay for all hours worked in excess of 10 hours per day or 40 hours per week.

ESTABLISHMENTS EXEMPT FROM OVERTIME --- ALL EMPLOYEES

1. Agriculture (farming). See [Wis. Admin. Code § DWD 274.04\(9\)](#).
2. Domestic service (in the private home of the employer)
3. Most non-profit organizations (contact the Division for specific information)
4. Federal agencies

PERSONS EXEMPT FROM OVERTIME IN CERTAIN BUSINESSES AND CIRCUMSTANCES AS PROVIDED IN DWD 274.04

(1) Salaried Executives, Administrative employees, and Professionals whose duties meet certain requirements.

Executive

- The primary duty is management of the enterprise or of a customarily recognized department or subdivision thereof;
- Customarily and regularly directs the work of 2 or more full-time employees;
- Has the authority to hire or fire other employee, or whose suggestions and recommendations about the hiring, firing, advancement, or promotion or any other change of status of other employees will be given particular weight;
- Customarily and regularly exercises discretionary powers; and
- Does not devote more than 20% (or in the case of an employee of a retail or service establishment who does not devote as much as 40%) of his or her hours of work in the workweek to activities which are not directly and closely related to the performance of the work described above.
- Compensated by a salary at a rate of \$700 per month or more.

Administrative

- The primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of his or her employer or the employer's customers.
- Customarily and regularly exercises discretion and independent judgment.
 - Regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; **or**
 - Performs under only general supervision work along specialized or technical lines requiring special training, experience, or knowledge; **or**
 - Executes special assignments and tasks solely under only general supervision.
- Does not devote more than 20% (or in the case of an employee of a retail or service establishment who does not devote as much as 40%) of his or her hours worked in the workweek to activities which are not directly and closely related to the performance of the work described above.
- Compensated by a salary or on a fee basis at a rate of \$700 per month or more.

Professional

- The primary duty consists of the performance of either:
 - Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes (a learned professional), **or**
 - Work that is original and creative in character in a recognized field of artistic endeavor, as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training, and the result of which depends primarily on the invention, imagination, or talent of the employee, (a creative professional).
- Work requiring the consistent exercise of discretion and judgment in its performance.
- Work that is intellectual and varied in character, as opposed to routine mental, manual, mechanical or physical work, and for which the product or the result accomplished cannot be standardized in relation to a given period of time.
- Does not devote more than 20% of his or her hours worked in the workweek to activities which are not an essential part of the work described above.
- Compensated by a salary or on a fee basis at a rate of \$750 per month or more.

(2) Outside salespersons who spend 80% of their time away from the employer's place of business.

(3) Certain employees of retail and service establishments paid by commission, if :

- 50% of earnings from commission, and
- time and one-half of minimum wage is received for **all** hours worked.

(4) Certain transportation employees. Drivers, driver's helpers, loaders or mechanics of a motor carrier or private or contract carrier over whom the US Department of Transportation takes jurisdiction. Any employee of an employer engaged in the operation of a common carrier by rail and any employee of a carrier by air subject to the provisions of the Railway Labor Act as amended.

(5) Drivers of taxicabs.

(6) Time spent in related classroom instruction by **indentured apprentices** need not be counted as work time for the purpose of computing overtime.

- (7) **Certain employees of vehicle dealerships.** Parts persons, salespersons, service managers, service writers, or mechanics selling or servicing automobiles, trucks, farm implements, trailers, boats, motorcycles, snowmobiles, other recreational vehicles or aircraft, when employed by a non-manufacturing establishment primarily engaged in selling such vehicles to ultimate purchasers.
- (8) **Employees of seasonal amusement or recreational establishments.** Any employee employed by an establishment which is an amusement or recreational establishment if:
- it does not operate for more than 7 months in any calendar year; or if
 - during the preceding calendar year, its average receipts for any 6 month period were not more than 33.33% of its average receipts for the other 6 months of that year.
- (9) **Agricultural employees.** Employees employed in agriculture including farming in all its branches, including, among other things, the cultivation & tillage of the soil, dairying, the production, cultivation, growing & harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, furbearing animals, or poultry, & any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.
- (10) Employees employed in any **motion picture theater**.
- (11) **Partial exemption for certain hospital employees.** Employees of a hospital or other institutions primarily engaged in the care of the sick, the aged, the mentally ill or persons with developmental disabilities who reside on the premises may have an agreement between the employer and the employee before performance of the work for the purpose of overtime computation. A work period of 14 consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation if time and one-half the regular rate of pay is paid for all hours worked in excess of eight hours per day and 80 hours within the 14-day period.
- (12) **Local delivery drivers with Department of Labor approved plans.** Employees employed as a driver or driver's helper making local deliveries, who are compensated for such employment based on trip rates or other delivery payment plan, if each plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them.
- (13) Employees employed in any **funeral establishment**.
- (14) Any employee employed in the following **forestry or lumbering operations**, if the number of employees employed by the employer in the operation does not exceed 8:
- Planting or tending trees, cruising, surveying or felling timber.
 - Preparing logs or other forestry products; or
 - Transporting logs or other forestry products to a mill, processing plant or railroad or other transportation terminal.
- (15) **Certain computer professionals.** Any employee who is a computer programmer, software engineer, or other similarly skilled worker, who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than \$27.63 an hour, and whose primary duty is one of the following:
- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.

- The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.
- The design, documentation, testing, creation or modification of computer program related to machine operating systems
- A combination of the duties described in pars. (a), (b) and (c), the performance of which requires the same level of skills.

COMMON QUESTIONS CONCERNING WISCONSIN'S OVERTIME REQUIREMENTS

1. If an employer uses a bi-weekly pay period, can the employer pay its employees overtime pay for working in excess of 80 hours per pay period rather than for over 40 hours per week?

No. In calculating overtime pay, the number of hours worked each week in the pay period must stand alone. If an employee worked 35 hours one week and 45 hours the second week of a pay period, the employee would be due 5 hours of overtime premium pay for that pay period.

2. Can an employer and an employee enter into an agreement to waive state overtime regulations?

An employer and an employee do not have the authority to reach an agreement to waive a state law or regulation concerning overtime pay. Since federal law may also require an employer to pay its employees overtime pay, it should be noted that a modification or waiver of state overtime rules would not exempt the employer from any federal overtime requirement.

3. If an employee works overtime hours that were not authorized by the employer, is the employer required to pay the employee for these hours?

Yes. Work not requested but suffered or permitted is still work time. It is the duty of management to exercise control and see that work is not performed if the employer does not want it to be performed. An employer cannot accept the benefits without compensating employees for these hours.

4. Can an employer use a compensatory time plan to reimburse employees who work overtime hours instead of paying overtime pay to these workers?

It depends. Compensatory time is not allowed in the private sector. For government employees, whether an employer chooses to pay the overtime premium directly in wages or offers the employee compensatory time, the employer is obligated to pay the person time and one-half the regular rate of pay for the overtime hours. If the employer pays the overtime premium by allowing the employee to use compensatory time the employee is entitled to use 1 ½ hours of compensatory time for each overtime hour worked.

5. Must an employer give its employees meal or rest breaks during a work shift?

Employees under 18 years of age must receive at least a 30-minute duty free meal period when working a shift greater than 6 hours in duration. Section DWD 274.02(2) recommends that employers provide similar breaks to adults, but does not require such breaks for adults. If an employer provides breaks of less than 30 consecutive minutes in duration, the break time will be counted as work time.

Employers must pay all employees for “on duty” meal periods. An “on duty” meal period is one where the worker is not provided at least 30 consecutive minutes free from work, or where the worker is not free to leave the premises of the employer during a meal period.

Employers also are not allowed to require that meals be accepted as part of the worker’s wages.

State law does not require that brief rest periods, or coffee breaks, be provided to employees. Such matters are to be determined between the employer and the employee directly.

Rest periods or breaks of less than 30 consecutive minutes each shift are considered work time and must be paid for. Employers may not deduct from a worker’s wages for any time off less than 30 consecutive minutes.

CALCULATING OVERTIME COMPENSATION:

Each employer subject to Wisconsin’s overtime regulations must pay to each covered employee time and one-half the regular rate of pay for all hours worked in excess of 40 hours per week.

“Week” means a calendar week or a regularly reoccurring period of 168 hours in the form of seven consecutive 24-hour periods.

Adults may work an unlimited number of hours per day and per week, as the law sets no limits.

The employer has the legal right to set the schedule of hours to be worked. The employee does not have the right to refuse to work unless otherwise negotiated in a collective bargaining agreement.

“Regular rate” includes all remuneration paid to or on behalf of the employee, such as commissions, non-discretionary bonus, premium pay, and piecework incentives.

“Regular rate of pay” is defined as the employee’s rate of pay per hour. An employer may choose to pay employees on a salary, commission, piece rate or other basis, but for purposes of calculating overtime pay for an employee, the employee’s wages must be converted into an hourly rate of pay. This can be accomplished by dividing the total hours an employee actually works in a pay period into the total regular wages the employee is paid in that pay period (regular wages would include hourly wages, commission, piece rate pay, bonuses, etc.).

Example: The employee earns a salary of \$360.00 per week plus commissions. In this week, the employee worked 44 hours and earned a commission of \$80.00. Total wages earned in that week total \$440.00. The \$440.00 becomes straight time for the 44 hours worked. The 44 hours are then divided into the \$440.00 to arrive at the regular average hourly rate of \$10.00 per hour. The \$10.00 is then divided in half, \$5.00, to arrive at the half-time rate. Then the 4 hours of over-time (44 hours minus 40 equals 4 hours of overtime), times \$5.00 equals an additional \$20.00 in overtime wage due in this week. Therefore, the total wages to be paid for that week equals \$440.00 plus \$20.00, for a total of \$460.00.

WISCONSIN’S PREVAILING WAGE RATE LAWS:

Wisconsin has three (3) separate prevailing wage rate laws. Each law covers a different type of project. Section 103.49 covers all types of projects bid by the state, except highway and related projects; Section 103.50 covers all highway and related projects bid by the state; and Section 66.0903 covers all projects bid or negotiated by a local governmental unit in the state. All workers who perform manual labor on the site of projects covered by these laws must receive the “prevailing wage rate” for the work they perform.

Each of these laws requires that all workers must receive at least time and one-half for all work performed in excess of 10 hours a day on Monday through Friday. All workers must also receive at least time and one-half for all work performed on Saturday, Sunday, and six (6) specified legal holidays (New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving Day and Christmas Day).

Workers covered by these laws must also receive at least time and one-half for all work performed in excess of 40 hours in any calendar week on the site of a project covered by these laws.

Daily overtime is not required on projects subject only to the federal Davis-Bacon Act. If a project is subject to both the state and federal laws, daily overtime must be paid. Contact the US Department of Labor, Wage and Hour Division, for information about Davis-Bacon. (608) 441-5221.

NUMBER OF DAYS OF WORK:

Employers may schedule the hours and days they wish their employees to work. In factories and retail establishments, Wisconsin sets limits requiring employees to have one day of rest somewhere in each calendar week. This is the "One Day of Rest in Seven" law, Wis. Stat. § 103.85. This law also exempts certain specific types of employment from coverage. Contact the Division for more information.

The Division can waive the requirements of this law if presented with a joint request from labor and management. If the Department grants such a waiver, the employer can ask employees if they wish to volunteer to work without rest.

Minors under age 16, are limited to 6 days of work a week in all employments under the Child Labor law, and thus are not affected by this statute.

RECORDS THAT EMPLOYERS MUST KEEP

Employers must keep the following records under the law for at least 3 years for each employee, other than salaried exempt employees:

1. Name and address.
2. Date of Birth.
3. Date of entering and leaving employment.
4. Time of beginning and ending of work each day.
5. Time of beginning and ending of meal period:
 - a. When the employee's meal periods are required or when such meal periods are to be deducted from work time.
 - b. This requirement shall not apply when work is of such a nature that production or business activity ceases on a regularly scheduled basis.
6. Total number of hours worked per day & per week.
7. Rate of pay and wages paid each payroll period.
8. The amount of and reason for each deduction from the wages earned.
9. The employee's production, if paid on other than time basis.

RECORDS OPEN TO THE EMPLOYEE:

Upon an employee's request, the employer must permit him or her to inspect certain personnel documents. Please refer to Wis. Stat. § 103.13 for information that is more detailed.

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FILING OF CLAIMS OR COMPLAINTS:

To file claims or complaints, or to obtain more information about any of these provisions, contact the Department's Equal Rights Division (except where otherwise noted) at either of these locations:

For more information regarding these laws, contact:

**STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION**

201 E WASHINGTON AVE, ROOM A100
PO BOX 8928
MADISON WI 53708

819 N 6th ST
ROOM 723
MILWAUKEE WI 53203

Telephone (608) 266-6860
TTY: (608) 264-8752

Telephone: (414) 227-4384
TTY: (414) 227-4081

or, visit our Website at: <http://dwd.wisconsin.gov/er>

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THE FEDERAL LAW

The Fair Labor Standards Act ("FLSA"), which is administered by the U.S. Dept. of Labor, may set overtime pay requirements for occupations or industries exempted by state law. It is the responsibility of the employer to determine liability under both laws. Complaints may also be filed with the following agency:

*U.S. LABOR DEPT - WAGE AND HOUR DIV
740 REGENT STREET, SUITE 102
MADISON WI 53715
TELEPHONE (608) 441-5221*